Supreme Court, U.S.
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No. 85-1076

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1985

JEAN LYONS, Guardian of the Person and Estate of Richard Raymond Whittington, a Minor,

Petitioner,

v.

DANIEL BUTE, Conservator of the Estate of Cherry Whittington, an Incompetent, and CHERRY WHITTINGTON a/k/a CHERRY WHITTINGTON PRICE,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

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No genuine constitutional or federal question is presented by petitioners' challenge to the Illinois statute involved.

The decision of the Illinois Supreme Court affords petitioner a full opportunity via a trial to be heard on her objections to restoration of child custody of the natural mother, one of the respondents herein.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Illinois statute governing the procedure for restoration of competency affords constitutional due process to persons entitled to be heard?

2. Whether in the circumstances of the instant record, petitioner was given a hearing on her objections to restoration of competency of the natural mother?

3. Whether the decision of the Supreme Court of Illinois gives petitioner a full opportunity to be heard, via a trial on the merits, of her purported objections to restoration of child custody to the natural mother?

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JEAN LYONS, Guardian of the Person and Estate of Richard Raymond Whittington, a Minor,

Petitioner,

v.

DANIEL BUTE, Conservator of the Estate of Cherry Whittington, an Incompetent, and CHERRY WHITTINGTON a/k/a CHERRY WHITTINGTON PRICE,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Illinois.

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Daniel Bute, as Conservator of the Estate of Cherry Whittington, an incompetent, and Cherry Whittington, a/k/a Cherry Whittington Price, respectfully request that this Court deny the PETITION FOR WRIT OF CERTIORARI seeking review of the decision of the Supreme Court of

Illinois in this case. That opinion is reported at 107 Ill. 2d 169, 483 N.E. 2d 210 (1985).

STATEMENT OF THE CASE

In 1978 Cherry Whittington (hereafter "Cherry") was charged with murder and manslaughter of her first husband, Ralph Whittington. Cherry was found not guilty by reason of insanity and briefly committed. Upon her being adjudicated incompetent, respondent Bute was appointed conservator of Cherry's estate.* Petitioner Jean Lyons (hereafter "Lyons") was appointed guardian of Cherry's minor child.

Upon Cherry's remarriage to Howard Price, her conservator, Daniel Bute, one of the respondents herein, petitioned the Circuit Court of LaSalle County, Illinois to terminate the conservatorship of her estate because she

*/ Under Illinois law a conservator (now called a "guardian") can be appointed for either or both of the "estate" or "person" of a ward. (Ill. Rev. Stats. 1981, ch. 110½, par. 11a-17a--18a). (App. I and J, Pet.) In proceedings below Cherry's conservator demonstrated that the homicide was in defense of her life and that of her child.

was capable of managing her own affairs. She was no longer incompetent. Respondent also simultaneously petitioned the Court to terminate Lyons' guardianship of Cherry's minor child and to restore custody to the natural mother. (R. C. 32, 77). In two separate proceedings, the circuit court:

> (1) Restored Cherry to competency and revoked the Letters of Conservatorship theretofore granted to respondent Bute;
>
> (2) Terminated Lyons' guardianship and restored the child to the custody of Cherry.

At the hearing conducted to restore competency, with due statutory notice, the circuit judge received evidence that Cherry was "not mentally ill", was now happily remarried, and was competent to handle her own affairs. Accordingly, the circuit court discharged Bute as conservator and set for hearing, as a separate matter, Cherry's petition to terminate Lyons' guardianship of the minor child. Lyons filed objections to that peti-

tion and to restoration of custody and contended that she was the only proper person to retain custody. (R. C 90-91).

Prior to the said hearing on Cherry's petition to terminate the guardianship and for restoration of child custody, Cherry and Lyons filed cross-motions for summary judgment accompanied by affidavits. (R. C 171).

The affidavits on behalf of Cherry in substance averred that Cherry was now happily adjusted and entirely competent to rear her child in a pleasant and comfortable environment. (R. C 118, 123, 128, 130, 133, 135, 152). Affidavits on behalf of Cherry also asserted that Lyons' continued guardianship seriously endangered the child's mental, moral, emotional health and well-being.

The circuit judge denied Lyons' motion to dismiss Cherry's petition for restoration and denied Lyons' cross-motion for summary judgment. (Tr. 8/22/83, p. 9). The court, upon consideration of the respective affidavits of the parties and other evidence in the file,

granted Cherry's motion for summary judgment, terminated Lyons' guardianship and restored custody of the minor child to Cherry. (R. C 250, Tr. 8/22/83).

On appeal the Appellate Court of Illinois, Third District, reversed the judgment of the circuit court on the ground that Lyons was entitled to, but did not receive, notice of the proceedings to terminate Cherry's competency.*

The Appellate Court invoked the prior Illinois statute, (Ill. Rev. Stats. 1977, ch. 110½, par. 11-14(b)) as requiring statutory notice to all "interested persons as the court directs". (App. H). The Appellate Court's opinion acknowledges that that statute was replaced by Ill. Rev. Stats. 1981, ch. 11a-20(c) but construed the current statute as requiring notice of the competency restoration proceedings be given to the guardian of the minor

*/ As hereafter shown, Lyons did receive actual notice of the proceedings restoring Cherry to competency, filed a formal petition to vacate that order, was granted a hearing on same and was assured that Lyons would receive due notice and an opportunity to oppose the pending petition to terminate her guardianship and custody of the minor child.

child of the incompetent. (App. C, Pet.).

On appeal to the Supreme Court of Illinois, the Appellate Court's decision was reversed in part and affirmed in part. The Illinois high court ruled:

(1) Termination of the conservatorship of Cherry's estate was proper and in accordance with the applicable Illinois statute, and that Lyons had "no statutory right to notice of a hearing to terminate the conservatorship" because Lyons had "no justiciable interest" in *that* proceeding. (App. A and B).

(2) With respect to termination of the child guardianship and restoration of custody to the natural mother, the Supreme Court of Illinois affirmed the Appellate Court and held that summary judgment was not proper because:

> Clearly, a custody decision in a case such as this requires a careful determination of the relevant facts and a sensitive weighing of a series of factors. A summary judgment proceeding is ill-suited to such a determination. (App. A, p. 56).

REASONS WHY WRIT SHOULD BE DENIED

I.

A. The Illinois statutes dealing with restoration of competency violates neither the Federal or State constitution and no genuine issue of "due process" or "equal protection" is involved.

Petitioner Lyons, as guardian of respondent Cherry's child, complains that she was "constitutionally" deprived of notice of the proceedings to restore Cherry to competency (and ultimately custody of her child). Petitioner contends that she had a "justiciable interest" in the proceedings to terminate Cherry's conservatorship because that "affected' petitioner's right to challenge the order restoring custody of the minor child to its natural mother.

The Illinois Supreme Court correctly held that petitioner was not entitled to statutory notice of the proceedings restoring Cherry to competency, but was entitled to a trial on the merits of her objections terminating Lyons' guardianship of the minor child.

Petitioner was in no way prejudiced by the Supreme Court's ruling and her claim of being deprived of "due process" and "equal protection of the laws" is frivolous and unworthy of this Court's attention.

The Illinois statute which petitioner asserts violates the Due Process and Equal Protection clauses of the Fourteenth Amendment of the Federal Constitution and parallel provisions in the Illinois Constitution, provides as follows:

> (a) Upon the filing of a petition by or on behalf of a disabled person or on its own motion, the court may terminate the adjudication of disability of the ward, revoke the letters of guardianship [formerly conservatorship] of the estate or person, or both, or modify the duties of the guardian if the ward's capacity to perform the tasks necessary for the care of its person or the management of his estate has changed so as to warrant such termination, revocation or modification. (Ill. Rev. Stats. 1981, ch. 110½, par. 11a-20)

Pursuant to the foregoing statute, prior to the filing and presentation of his petition to the circuit court to terminate the conservatorship, respondent Bute served notice upon his ward, Mrs. Cherry Whittington Price, advising her of the hearing on the petition which was set

for June 3, 1983. (R. C 32). Admittedly, no notice was served upon Jean Lyons or her counsel because such notice was not required under the Illinois Act in force at the time of the proceedings. With respect to the requirement of notice, the statute provides:

> (c) Notice of the hearing on a petition under this Section together with a copy of the petition, shall be given to the ward, unless he is the petitioner, and to the guardian [conservator] not less than 14 days before the hearing. (Ill. Rev. Stats. 1981, ch. 110½, par. 11a-20(c)).

Under the foregoing statute all of the notice provisions were satisfied. A prior statute requiring notice on a petition to restore competency or revocation of Letters of Office to be served upon any "interested person the court directs..." (Ill. Rev. Stats., ch. 110½, par. 11-14) was replaced by the statute above-quoted. As conceded even by the Illinois Appellate Court, par. 11a-20(c), the current statute, by its terms requires no notice to anyone but the ward. (App. C, p. 70 Pet.).

B. Although not given formal notice of the hearing to terminate the conservatorship, the guardian of Cherry's child was fully aware of that proceeding, filed objections to the petition to terminate conservatorship and was given a full hearing as to the propriety of the order restoring Cherry to competency.

Petitioner's complaint that she was deprived of constitutional due process because she did not receive notice of respondent Bute's petition to terminate the conservatorship is a sham issue and purely academic. The record shows that in fact Lyons had learned of the proceedings, promptly filed her objections to Bute's petition to terminate the conservatorship and thereafter was given a hearing on her motion to vacate the order discharging the conservator. (R. C 35, 38). Indeed, the Appellate Court itself notes that the trial judge "considered and ruled upon Jean Lyons' motion for reconsideration of the termination of the conservatorship." (App. C, p. 72, Pet.).

Because of its holding that Lyons was not entitled to statutory notice of the restoration of competency proceedings, the Supreme Court of Illinois did not deem it necessary

to address the fact that indeed Lyons was not deprived of due process or an opportunity to be heard. After ruling that petitioner Lyons had no "justiciable interest in the conservatorship of Cherry's estate" the Illinois Supreme Court said:

> Because we so hold, we need not address [Cherry's] additional argument that the hearing given to respondent [Lyons] by the circuit court on her objections to the termination of the conservatorship cured any defect that might have resulted from lack of notice to [Lyons]. We need only add that the hearing conducted by the circuit court appears to have been adequate and that the decision was fully supported by the evidence in the record. We therefore affirm the circuit court's order terminating [Cherry's] conservatorship. (App. A, pp. 50-51, Pet.).

C. The Illinois statute totally satisfies the requirements of Due Process.

This Court's classic formulation of the requirements of civil due process--are not infringed by the Illinois statute which provides notice to persons entitled to notice --i.e. those persons whose interests are entitled to protection. See: Paul v. Davis, 424 U.S. 693 (1976) (The court scrutinizes

the statutory enactment to determine whether an interest is entitled to protection). See also Bishop v. Wood, 426 U.S. 341 (1976); Mitchell v. W. T. Grant Co., 416 U.S. 600 (1975)(sustaining a Louisiana sequestration statute).

Petitioner here is vouchsafed a full hearing via a trial of her objections to terminate her guardianship and restore the minor child to the natural mother, but fails to show any prejudice to her interests by her attack on the constitutionality of the instant statute.

D. Petitioner's invocation of the Equal Protection Clause is irresponsible and unsupported.

Without citation of a single authority, petitioner also claims that the "question presented for review" is "whether a minor child and his legal guardian were denied due process of law and equal protection of the law in violation [of the Federal and State Constitutions]." (Pet. i) (Emphasis added).

In no particular does petitioner demonstrate that Equal Protection is violated, or now an unreasonable classification is involved. Under current analysis of the Equal Protection Clause strict scrutiny may be applied to a State statute impinging on a suspect class or fundamental right absent a compelling State interest in the classification. Only a few statutes survive such strict scrutiny. Korematsu v. United States, 323 U.S. 214 (1944) Massachusetts Board of Retirement v. Murgia, 42 U.S. 307 (1976); San Antonio School Dist. v. Rodriguez, 411 U.S. 1; Minnesota v. Cloverleaf Creamery Co., U.S. , 101 S. Ct. 715 (1981)

Illinois construes the Equal Protection Clause of its own constitution (Art. I, sec. 2) by a similar standard. See: Kujawinski v. Kujawinski, 71 Ill. 2d 563, 376 N.E. 2d 1382; People ex rel Difains v. Barr, 83 Ill. 2d 191, 414 N.E. 2d 731 (1980); Illinois Housing Development Authority v. Van Meter, 82 Ill. 2d 116, 412 N.W. 2d 151 (1980).

E. Petitioner has not preserved any of the purported constitutional questions he attempts to raise in this Court.

A perusal of the opinions of the Illinois Supreme Court and of the Illinois Appellate Court reveals that petitioner Lyons at no point properly raised or preserved any questions concerning the constitutionality of the Illinois statute involved.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorary should be denied.

Respectfully submitted,

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Illinois enacted a new law which extinguished the right of a child's guardian to be present at a hearing on the termination of the conservatorship of the child's parent, which right was previously recognized by the State of Illinois in an earlier law.

The Bishop case cited by the Respondent has no application to this case since it concerns the right of an at-will employee to continued employment, a right which thus far has not been recognized by this Court. (Bishop v. Wood, 426 U.S. 341 (1976).

In the Mitchell case a trial court in a pre-trial proceeding allowed a creditor to have possession of certain personal property after the debtor's default, without notice or hearing to the debtor, in order to prevent waste or transfer. The court noted that the